

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

**KHALID SHAIKH MOHAMMAD,
WALID MUHAMMAD SALIH
MUBARAK BIN ATTASH,
RAMZI BINALSHIBH,
ALI ABDUL AZIZ ALI,
MUSTAFA AHMED ADAM AL
HAWSAWI**

AE013L

Government's Supplemental Motion
For Modified Order To Protect
Against Disclosure of
National Security Information

25 September 2012

1. Timeliness

This Motion is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.b.(1).

2. Relief Sought

The Government respectfully requests that the Military Judge issue the proposed modified order to protect national security information from disclosure, attached hereto. *See* 10 U.S.C. § 949p-3; Military Commission Rule of Evidence (M.C.R.E.) 505(e).

3. Overview

Since 26 April 2012, the government has sought an order in this case to establish procedures applicable to all persons who have access to or come into possession of classified documents or information in connection with this case to protect against the unauthorized disclosure of all currently and properly classified information. *See* AE 013. This case involves information that has been properly classified and that the defense has already accessed, in addition to classified discovery that the government expects to provide. The storage, handling and control of classified material, by law or regulation, requires special security precautions, and access to which requires a security clearance and a "need-to-know." Exec. Order No. 13526 §

4.1 (a), 75 Fed. Reg. 707 (Jan. 5, 2010). The government respectfully requests that the attached modified protective order be issued pursuant to statutorily mandated provisions. See 10 U.S.C. § 949p-3; Military Commission Rule of Evidence (M.C.R.E.) 505(e).

4. Burden of proof

As the moving party, the government must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

5. Facts

This case alleges a conspiracy between the five accused and al Qaeda, an international terrorist organization which has been and continues to engage in hostilities against the United States. On 31 May 2011 and 25 January 2012, pursuant to the Military Commissions Act of 2009, charges in connection with the 11 September 2001 attacks were sworn against Khalid Shaikh Mohammad (Mohammad), Walid Muhammad Salih Bin Attash (Bin Attash), Ramzi Binalshibh (Binalshibh), Ali Abdul Aziz Ali (Ali), and Mustafa Ahmed Adam al Hawsawi (Hawsawi). These charges were referred jointly to this capital Military Commission on 4 April 2012. The accused are each charged with Conspiracy, Attacking Civilians, Attacking Civilian Objects, Intentionally Causing Serious Bodily Injury, Murder in Violation of the Law of War, Destruction of Property in Violation of the Law of War, Hijacking an Aircraft, and Terrorism.

On 26 April, 2012, the government filed its Motion to Protect Against Disclosure of National Security Information. *See* AE 013. The 26 April 2012 proposed order set forth the storage and handling procedures for classified information, and included in its definition of classified information, material that could be conveyed orally. AE 013, Attachment E, Proposed Order at ¶ 6(d). Specifically, the order sought to reduce the risk of disclosing classified information to those without a “need to know” by requiring the parties to treat the accused statements as classified at the TOP SECRET / SCI level due to their exposure to classified sources and methods, or activities of the United States. AE 013, Attachment E, Proposed Order at ¶ 7(d)(vi). The defense filed a response on 18 May 2012. (AE 013G). The defense objected

to the proposed order, alleging that the order required defense counsel to treat all communications by the accused at the TS/SCI level until and unless they were reviewed by an original classification authority. Currently, there is no protective order in place.

6. Law and Argument

The government has requested the execution of a protective order in this case that would establish procedures for all persons who have access or come into possession of classified documents or information in this case. This protective order is sought pursuant to M.C.R.E. 505(e), which provides that, "Upon motion of the trial counsel, the military judge shall issue an order to protect against the disclosure of any classified information that has been disclosed by the United States to any accused or counsel, regardless of the means by which the accused or counsel obtained the classified information, in any military commission [under the M.C.A.] or that has otherwise been provided to, or obtained by, any such accused in any such military commission." 10 U.S.C. § 949p-3; M.C.R.E. 505(e).

The 26 April 2012 proposed order sets forth the parties obligations with respect to handling classified information, including: 1) defining classified information; 2) explaining the role of the Court Security Officer (CSO); 3) access requirements; 4) the appropriate use, storage, and handling procedures; 5) the procedures for filing documents; 6) notice requirement for use of classified information in proceedings; 7) implementation of security procedures to protect against unauthorized disclosures to individuals without a clearance and a "need to know"; 8) sanctions and criminal penalties available in the event of unauthorized disclosures; 9) the disposition of classified material upon conclusion of the case.

Prior to accessing classified information, an individual must first obtain a security clearance. The obligations of the parties to properly handle classified information set forth in the proposed protective order are based upon the requirements for maintaining such a clearance. Other provisions set forth in the protective order are statutorily mandated for criminal proceedings in which classified information is at issue and in fact are no different than the

provisions found in protective orders issued in Federal court terrorism cases in the early stages of a case to govern the parties obligations with respect to classified information. *See*, Protective Order, *United States v. Warsame*, No. 11 CR 559 (S.D.N.Y. Sept. 9, 2011); Protective Order, *United States v. Ghailani*, No. 98 CR 1023 (S.D.N.Y. Jul. 21, 2009); *United States v. Amawi*, No. 06 CR 719 (N.D.OH. Jul. 17, 2006); *United States v. Moussaoui*, No. 01 CR 455 (E.D.VA. Jan. 22, 2002); *United States v. Bin Laden*, No. 98 CR 1023 (S.D.N.Y. Jul. 29, 1999); Classified Information Procedures Act, 18 U.S.C. App. 3 (CIPA); 10 U.S.C. § 949p-1(d) (making the judicial construction of CIPA authoritative under the M.C.A. where not inconsistent with specific M.C.A. provisions).

The government has a legitimate interest in seeking a protective order at the initiation of a case that will involve classified information to reduce or eliminate the risk that a criminal prosecution will precipitate the unauthorized disclosure of classified information. Indeed, the circumstances precipitating CIPA's enactment make it abundantly clear that it is easier and more effective to prevent the release of classified information in advance than to attempt to undo the damage of unauthorized disclosures after the fact. *See Snepp v. United States*, 444 U.S. 507, 512-13, 62 L. Ed. 2d 704, 100 S. Ct. 763 & nn. 7-8 (1980) (*per curiam*) (noting that unless the Government has adequate mechanisms to prevent unauthorized disclosures, potential sources of classified information may be unwilling to provide such information to the intelligence-gathering [**22] community); *id.* at 514-15 (stating that unauthorized disclosures might cause irreparable harm to the Government and that it may be practically impossible to seek redress against the disclosing party); S. Rep. 96-823 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4294 (referring to a study performed by the Subcommittee on Secrecy and Disclosure of the Senate Intelligence Committee and stating that the study's "key finding . . . was that prosecution of a defendant for disclosing national security information often requires the disclosure in the course of trial of the very information the laws seek to protect"); *see also* Exec. Order No. 12968, 60 *Fed. Reg.* 40,245, at preamble (1995).

The defense in this case all hold the requisite clearance for information that may be provided or that they will have access to during the course of their representation of the accused. In addition, the defense have been provided with classification guidance regarding the classified information that they are likely to encounter during the course of their representation. The defense have noted their objection to requirement in the protective order “that statements made by the Accused, which, due to these individuals’ exposure to classified sources, methods, or activities of the United States, are presumed to contain information classified as TOP SECRET / SCI.” *See* Attachment E to AE 013, para. 7d. The defense misleadingly construes “presumptive classification” as a separate category of classified information, implying that such information can only be “born” as a result of action by an original classification authority. As explained in the government’s response to AE009, the defense fails to acknowledge that classified information may include material that can be conveyed orally and is not limited to information contained in a document that the government has the ability to physically mark. *See*, Exec. Order No. 13526 §6.1(t). When granting an individual a security clearance, the government does not provide a waiver for the protection of classified informational that is conveyed in such a fashion. The form of the classified information does not alter its classification, nor is the damage to national security somehow diminished due to an unauthorized disclosure. Accordingly, in a criminal prosecution, the government is entitled to seek an order to protect against the disclosure of classified information, regardless of its form.

In this case, like other cases in which the accused or defendant have had access to classified information, the government has a legitimate national security interest in seeking procedures for the handling and storage of such information that reduces or eliminates the harm to national security that unauthorized disclosures may cause. Accordingly, the government seeks to ensure that the parties handle information that can be conveyed orally according to the appropriate classification levels to which they have been so advised. *See*, Protective Order, *United States v. Warsame*, No. 11 CR 559 (S.D.N.Y. Sept. 9, 2011); Protective Order, *United States v. Ghailani*, No. 98 CR 1023 (S.D.N.Y. Jul. 21, 2009); *United States v. Amawi*, No. 06 CR

719 (N.D.OH. Jul. 17, 2006); *United States v. Moussaoui*, No. 01 CR 455 (E.D.VA. Jan. 22, 2002); *United States v. Bin Laden*, No. 98 CR 1023 (S.D.N.Y. Jul. 29, 1999).

Contrary to the defense assertions, it is the sole responsibility of an original classification authority, not the defense, to classify or declassify information. As articulated in the government's 26 April 2012 submission, the accused have been exposed to classified information at the TS/SCI level. Although they are not prohibited from discussing that information with their defense counsel, and although there are some statements by the accused that contain nothing even potentially classified (i.e., "Thank you for coming to speak with me today.") the government has the right to seek protective measures to ensure that defense counsel, who are authorized to have access to the classified information known to their clients, will treat such information in the appropriate manner. Because the government has no interest in monitoring the privileged communications between the accused and their defense to properly determine the classification level of any notes taken during the meeting, the proposed mechanism in the 26 April 2012 protective order required the parties to treat all statements of the accused at the highest level of classification to which the accused had previously been exposed. *See, e.g., Al Odah v. United States*, 346 F.Supp. 2d 1, 8-14 (D.D.C. 2004) (court determined that the government's national security concerns were legitimate and, therefore, the defense was required to have a security clearance and to treat all information obtained during the course of their representation as classified until a classification review was conducted).

The 26 April 2012 order did not however, restrict the accused in any way from communicating with their counsel about any topic. It simply requested that the defense counsel handle and store such privileged communications as classified until and unless they requested a classification review. Nor did the protective order restrict the ability of the defense to use the statements in litigation. The order directed the defense to comply with the statutorily mandated procedures for using classified information, contained in M.C.R.E 505 and modeled after CIPA.

Without conceding that the proposed order placed unduly burdensome restrictions upon defense counsel but nevertheless seeking to provide convenient handling and storage options

consistent with the protection of national security information, the government hereby proposes that the protective order it moved the commission to sign on 26 April 2012 be amended. The modified order provides that with respect to information obtained from their clients, defense counsel treat and handle as classified only information that that they know or have a reason to know is classified, including information that relates to specific aspects of the CIA RDI program that remain classified. While the 26 April 2012 proposed order featured legitimate protections for handling classified information, the order, as modified, seeks to alleviate defense concerns that uncertainty may be causing them to unnecessarily treat orally conveyed information as classified when it is clearly unrelated to the classified sources, methods and activities of the United States that the accused have been previously exposed. The modified order will require that defense counsel scrupulously adhere to the classification guidance previously provided as a condition of their read-in to special access programs in determining how to treat information that has been orally conveyed to them by the accused. The government has not modified any other provisions of the 26 April 2012 order.

7. Conclusion

The Government respectfully requests that the Military Judge issue the modified protective order to establish procedures applicable to all persons who have access to or come into possession of classified documents or information in connection with this case to protect against the unauthorized disclosure of all currently and properly classified information.

8. Oral Argument

The government is willing to waive oral argument but requests an opportunity to be heard should the defense request oral argument.

9. Witnesses and Evidence

None

10. Certificate of Conference

The defense objects to the entry of the government's modified order.

11. Additional Information

None.

12. Attachments

- A. Certificate of Service, dated 25 September 2012.
- B. Modified 9/11 Proposed Order to Protect Against Disclosure of National Security Information.

Respectfully submitted,

//s//

Joanna P. Baltes
Deputy Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

CERTIFICATE OF SERVICE

I certify that on the 25th day of September 2012, I filed AE013L, the **Government's Supplemental Motion for Modified Order To Protect Against Disclosure of National Security Information** with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

/s/

Joanna Baltes
Deputy Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	PROTECTIVE ORDER #1 To Protect Against Disclosure of National Security Information _____ 2012
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Upon consideration of the submissions regarding the Government's motion for a protective order to protect classified information in this case, the Commission finds that this case involves classified national security information, including TOP SECRET / SENSITIVE COMPARTMENTED INFORMATION (SCI), the disclosure of which would be detrimental to national security, the storage, handling, and control of which requires special security precautions, and access to which requires a security clearance and a need-to-know. Accordingly, pursuant to authority granted under 10 U.S.C. §§ 949p-1 to 949p-7, Rules for Military Commissions (R.M.C.) 701 and 806, Military Commission Rule of Evidence (M.C.R.E.) 505, Regulation for Trial by Military Commissions (R.T.M.C.) ¶ 17-3, and the general supervisory authority of the Commission, in order to protect the national security, and for good cause shown, the following Protective Order is entered.

I. SCOPE

1. This Protective Order establishes procedures applicable to all persons who have access to or come into possession of classified documents or information in connection with this case,

regardless of the means by which the persons obtained the classified information. These procedures apply to all aspects of pretrial, trial, and post-trial stages in this case, including any appeals, subject to modification by further order of the Commission.

2. This Protective Order applies to all information, documents, testimony, and material associated with this case that contain classified information, including but not limited to any classified pleadings, written discovery, expert reports, transcripts, notes, summaries, or any other material that contains, describes, or reflects classified information.

3. Counsel are responsible for advising their clients, translators, witnesses, experts, consultants, support staff, and all others involved with the defense or prosecution of this case, respectively, of the contents of this Protective Order.

II. DEFINITIONS

4. As used in this Protective Order, the term “Defense” includes any counsel for the Accused in this case and any employees, contractors, investigators, paralegals, experts, translators, support staff or other persons working on the behalf of the Accused or his counsel in this case.

5. The term “Government” includes any counsel for the United States in this case and any employees, contractors, investigators, paralegals, experts, translators, support staff or other persons working on the behalf of the United States or its counsel in this case.

6. The words “documents” and “information” include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming copies and non-conforming copies, whether different from the original by reason of notation made on such copies or otherwise, and further include, but are not limited to:

a. papers, correspondence, memoranda, notes, letters, cables, reports, summaries, photographs, maps, charts, graphs, inter-office and intra-office communications, notations of any sort concerning conversations, meetings, or other communications, bulletins, teletypes, telegrams, facsimiles, invoices, worksheets, and drafts, alterations, modifications, changes, and amendments of any kind to the foregoing;

b. graphic or oral records or representations of any kind, including, but not limited to: photographs, charts, graphs, microfiche, microfilm, videotapes, and sound or motion picture recordings of any kind;

c. electronic, mechanical, or electric records of any kind, including, but not limited to: tapes, cassettes, disks, recordings, electronic mail, instant messages, films, typewriter ribbons, word processing or other computer tapes, disks or portable storage devices, and all manner of electronic data processing storage; and

d. information acquired orally.

7. The terms “classified national security information and/or documents,” “classified information,” and “classified documents” include:

a. any classified document or information that was classified by any Executive Branch agency in the interests of national security or pursuant to Executive Order, including Executive Order 13526, as amended, or its predecessor Orders, as “CONFIDENTIAL,” “SECRET,” “TOP SECRET,” or additionally controlled as “SENSITIVE COMPARTMENTED INFORMATION (SCI)” and specifically designated by the United States for limited or restricted dissemination or distribution;

b. any document or information, regardless of its physical form or characteristics, now or formerly in the possession of a private party that was derived from United States

Government information that was classified, regardless of whether such document or information has subsequently been classified by the Government pursuant to Executive Order, including Executive Order 13526, as amended, or its predecessor Orders, as “CONFIDENTIAL,” “SECRET,” “TOP SECRET,” or additionally controlled as “SENSITIVE COMPARTMENTED INFORMATION (SCI)”;

c. verbal or non-documentary classified information known to the Accused or the Defense;

d. any document or information as to which the Defense has been notified orally or in writing that such document or information contains classified information, including, but not limited to the following:

(i) Information that would reveal or tend to reveal details surrounding the capture of the Accused other than the location and date;

(ii) Information that would reveal or tend to reveal the foreign countries in which: Khalid Shaikh Mohammad (Mohammad) and Mustafa Ahmed Adam al Hawsawi (Hawsawi) were detained from the time of their capture on or about 1 March 2003 through 6 September 2006; Walid Muhammad Salih Bin Attash (Bin Attash) and Ali Abdul Aziz Ali (Ali) were detained from the time of their capture on or about 29 April 2003 through 6 September 2006; and Ramzi Binalshibh (Binalshibh) was detained from the time of his capture on or around 11 September 2002 through 6 September 2006.

(iii) The names, identities, and physical descriptions of any persons involved with the capture, transfer, detention, or interrogation of the Accused or specific dates regarding the same, from on or around the aforementioned capture dates through 6 September 2006;

(iv) The enhanced interrogation techniques that were applied to the Accused from on or around the aforementioned capture dates through 6 September 2006, including descriptions of the techniques as applied, the duration, frequency, sequencing, and limitations of those techniques; and

(v) Descriptions of the conditions of confinement of the Accused from on or around the aforementioned capture dates through 6 September 2006;

e. In addition, the term “information” shall include without limitation observations and experiences of the Accused with respect to the matters set forth in subparagraphs 7(d)(i)-(v), above.

f. any document or information obtained from or related to a foreign government or dealing with matters of U.S. foreign policy, intelligence, or military operations, which is known to be closely held and potentially damaging to the national security of the United States or its allies.

8. “National Security” means the national defense and foreign relations of the United States.

9. “Access to classified information” means having authorized access to review, read, learn, or otherwise come to know classified information.

10. “Secure area” means a physical facility accredited or approved for the storage, handling, and control of classified information.

11. “Unauthorized disclosure of classified information” means any knowing, willful, or negligent action that could reasonably be expected to result in a communication or physical transfer of classified information to an unauthorized recipient. Confirming or denying information, including its very existence, constitutes disclosing that information.

III. COMMISSION SECURITY OFFICER

12. A Commission Security Officer (CSO) has been appointed by the Commission for the purpose of providing security arrangements necessary to protect against unauthorized disclosure of any classified documents or information in connection with this case. The CSO is authorized to appoint Alternate Commission Security Officers (ACSOs) as necessary. All references to the CSO herein shall be deemed to refer also to any ACSOs appointed to this case.

13. The parties shall seek guidance from the CSO with regard to the appropriate storage, handling, and use of classified information. The CSO shall consult with the original classification authority (OCA) of classified documents or information, as necessary, to address classification decisions or other related issues.

14. The CSO shall not reveal to any person, including the Government, the content of any conversations the CSO hears by or among the Defense, nor reveal the nature of documents being reviewed by the Defense or the work generated by the Defense, except as necessary to report violations of this Protective Order to the Commission after appropriate consultation with the Defense or to carry out duties pursuant to this Protective Order. Additionally, the presence of the CSO shall not operate as a waiver of any applicable privilege under the Military Commissions Act, 10 U.S.C. § 948a, *et seq.* (M.C.A.), R.M.C., or M.C.R.E.

IV. ACCESS TO CLASSIFIED INFORMATION

15. Without authorization from the Government, no member of the Defense, including defense witnesses, shall have access to classified information in connection with this case unless that person has:

- a. received the necessary security clearance from the appropriate Department of Defense (DoD) authorities and signed an appropriate non-disclosure agreement, as verified by the CSO;
- b. signed the Memorandum of Understanding Regarding Receipt of Classified Information (MOU), attached to this Protective Order, agreeing to comply with the terms of this Protective Order; and
- c. a need-to-know the classified information at issue, as determined by the OCA of that information.

16. In order to be provided access to classified information in connection with this case, each member of the Defense shall execute the attached MOU, file the executed originals of the MOU with the Commission, and submit copies to the CSO and counsel for the Government. The execution and submission of the MOU is a condition precedent to the Defense having access to classified information for the purposes of these proceedings.

17. The substitution, departure, or removal of any member of the Defense, including defense witnesses, from this case for any reason shall not release that person from the provisions of this Protective Order or the MOU executed in connection with this Protective Order.

18. Once the CSO verifies that counsel for the Accused have executed and submitted the MOU, and are otherwise authorized to receive classified information in connection with this case, the Government may provide classified discovery to the Defense, either directly or via the CSO, who will assist as necessary in ensuring the material is delivered to the Defense.

19. All classified documents or information provided or obtained in connection with this case remain classified at the level designated by the OCA, unless the documents bear a clear indication that they have been declassified. The person receiving the classified documents or

information, together with all other members of the Defense or the Government, respectively, shall be responsible for protecting the classified information from disclosure and shall ensure that access to and storage of the classified information is in accordance with applicable laws and regulations and the terms of this Protective Order.

20. No member of the Defense, including any defense witness, is authorized to disclose any classified information obtained during this case, outside the immediate parameters of these military commission proceedings. If any member of the Defense, the Accused, or any defense witness receives any summons, subpoena, or court order, or the equivalent thereof, from any United States or foreign court or on behalf of any criminal or civil investigative entity within the United States or from any foreign entity, the Defense, including defense witnesses, shall immediately notify the Commission, the CSO, and the Government so that appropriate consideration can be given to the matter by the Commission and the OCA of the materials concerned. Absent authority from the Commission or the Government, the Defense, the Accused, and defense witnesses are not authorized to disseminate or disclose classified materials in response to such requests. The Defense, the Accused, and defense witnesses and experts are not authorized to use or refer to any classified information obtained as a result of their participation in commission proceedings in any other forum, or in a military commission proceeding involving another detainee.

V. USE, STORAGE, AND HANDLING PROCEDURES

21. The Office of the Chief Defense Counsel, Office of Military Commissions, has approved secure areas in which the Defense may use, store, handle, and otherwise work with classified information. The CSO shall ensure that such secure areas are maintained and operated in a

manner consistent with this Protective Order and as otherwise reasonably necessary to protect against the disclosure of classified information.

22. All classified information provided to the Defense, and otherwise possessed or maintained by the Defense, shall be stored, maintained, and used only in secure areas. Classified information may only be removed from secure areas in accordance with this Protective Order and applicable laws and regulations governing the handling and use of classified information.

23. Consistent with other provisions of this Protective Order, the Defense shall have access to the classified information made available to them and shall be allowed to take notes and prepare documents with respect to such classified information in secure areas.

24. The Defense shall not copy or reproduce any classified information in any form, except in secure areas and in accordance with this Protective Order and applicable laws and regulations governing the reproduction of classified information.

25. All documents prepared by the Defense that are known or believed to contain classified information—including, without limitation, notes taken or memoranda prepared by counsel and pleadings or other documents intended for filing with the Commission—shall be transcribed, recorded, typed, duplicated, copied, or otherwise prepared only by persons possessing an appropriate approval for access to such classified information. Such activities shall take place in secure areas, on approved word processing equipment, and in accordance with procedures approved by the CSO. All such documents and any associated materials containing classified information—such as notes, memoranda, drafts, copies, typewriter ribbons, magnetic recordings, and exhibits—shall be maintained in secure areas unless and until the CSO advises that those documents or associated materials are unclassified in their entirety. None of these materials shall

be disclosed to the Government unless authorized by the Commission, by counsel for the Accused, or as otherwise provided in this Protective Order.

26. The Defense may discuss classified information only within secure areas and shall not discuss, disclose, or disseminate classified information over any non-secure communication system, such as standard commercial telephones, office intercommunication systems, or non-secure electronic mail.

27. The Defense shall not disclose any classified documents or information to any person, including counsel in related cases of Guantanamo Bay detainees in military commissions or other courts (including, but not limited to, habeas proceedings), except those persons authorized by this Protective Order, the Commission, and counsel for the Government with the appropriate clearances and the need-to-know that information.

28. To the extent that the Defense is not certain of the classification of information it wishes to disclose, the Defense shall consult with the CSO for a determination as to its classification. In any instance in which there is any doubt as to whether information is classified, the Defense must consider the information classified unless and until it receives notice from the CSO that such information is not classified.

29. Until further order of this Commission, the Defense shall not disclose to the Accused any classified information not previously provided by the Accused to the Defense, except where such information has been approved for release to the Accused and marked accordingly.

30. Except as otherwise stated in this paragraph, and to ensure the national security of the United States, at no time, including any period subsequent to the conclusion of these proceedings, shall the Defense make any public or private statements disclosing any classified information accessed pursuant to this Protective Order, or otherwise obtained in connection with

this case, including the fact that any such information or documents are classified. In the event classified information enters the public domain without first being properly declassified by the United States Government, counsel are reminded that they may not make public or private statements about the information if the information is classified. (See paragraph 7 of this Protective Order for specific examples of information which remains classified even if it is in the public domain.) In an abundance of caution and to help ensure clarity on this matter, the Commission emphasizes that counsel shall not be the source of any classified information entering the public domain, nor should counsel comment on information which has entered the public domain but which remains classified.

VI. PROCEDURES FOR FILING DOCUMENTS

31. Any pleading or other document filed with the Commission in this case, which counsel know, reasonably should know, or are uncertain of whether the filing contains classified information, shall be filed under seal in accordance with the provisions of the M.C.A., R.M.C., M.C.R.E., R.T.M.C., and the Military Commissions Trial Judiciary Rules of Court applicable to filing classified documents or information. Documents containing classified information that is not at the TS/CODEWORD level shall be filed pursuant to the procedures specified for classified information contained in the Trial Judiciary Rules of Court 3(10)(d) to the extent that the material can be transmitted via the Secret Internet Protocol Router Network (SIPR). Information that is classified at the TS/CODEWORD level, including presumptively classified statements of the Accused that have not yet been determined to be unclassified by the appropriate Government agency, cannot be transmitted via SIPR and must be provided in hard copy to the Chief Clerk of the Trial Judiciary.

32. Classified filings must be marked with the appropriate classification markings on each page, including classification markings for each paragraph. If a party is uncertain as to the appropriate classification markings for a document, the party shall seek guidance from the CSO, who will consult with the OCA of the information or other appropriate agency, as necessary, regarding the appropriate classification.

33. When filing classified documents or information under seal, the parties shall file the papers containing classified information with the Military Commissions Trial Judiciary Staff ("Judiciary Staff") and provide notice of the classified filing to the other party. Once a filing is properly filed, the CSO for the Judiciary Staff shall promptly review the filing, and in consultation with the appropriate Government agencies, determine whether the filing contains classified information and is marked appropriately. The Judiciary Staff shall then ensure the classified filing is promptly served on the other party (unless filed *ex parte*) and reflected in the filings inventory with an unclassified entry noting that it was filed under seal.

34. The CSO and Judiciary Staff shall ensure any classified information contained in such filings is maintained under seal and stored in an appropriate secure area consistent with the highest level of classified information contained in the filing. All portions of any filed papers that do not contain classified information will be unsealed (unless filed *in camera* or *ex parte*) for inclusion in the public record.

35. Under no circumstances may classified information be filed in an unsealed filing. In the event a party believes that an unsealed filing contains classified information, the party shall immediately notify the CSO and Judiciary Staff, who shall take appropriate action to retrieve the documents or information at issue. The filing will then be treated as containing classified information unless and until the CSO determines otherwise. Nothing herein limits the

Government's authority to take other remedial action as necessary to ensure the protection of the classified information.

36. Nothing herein requires the Government to disclose classified information. Additionally, nothing herein prevents the Government from submitting classified information to the Commission *in camera* or *ex parte* in these proceedings or entitles the Defense access to such submissions or information. Except for good cause shown in the filing, the Government shall provide the Defense with notice on the date of the filing.

VII. PROCEDURES FOR MILITARY COMMISSION PROCEEDINGS

37. Except as provided herein, and in accordance with M.C.R.E. 505, no party shall disclose or cause to be disclosed any information known or believed to be classified in connection with any hearing or proceeding in this case.

A. Notice Requirements

38. The parties must comply with all notice requirements under M.C.R.E. 505 prior to disclosing or introducing any classified information in this case.

39. Because all statements of the Accused are presumed to contain information classified as TOP SECRET / SCI, the Defense must provide notice in accordance with this Protective Order and M.C.R.E. 505(g) if the Accused intends to make statements or offer testimony at any proceeding.

B. Closed Proceedings

40. While proceedings shall generally be publicly held, the Commission may exclude the public from any proceeding, *sua sponte* or upon motion by either party, in order to protect information the disclosure of which could reasonably be expected to damage national security. If the Commission closes the courtroom during any proceeding in order to protect classified

information from disclosure, no person may remain who is not authorized to access classified information in accordance with this Protective Order, which the CSO shall verify prior to the proceeding.

41. No participant in any proceeding, including the Government, Defense, Accused, witnesses, and courtroom personnel, may disclose classified information, or any information that tends to reveal classified information, to any person not authorized to access such classified information in connection with this case.

C. Delayed Broadcast of Open Proceedings

42. Due to the nature and classification level of the classified information in this case, including the classification of the Accused's statements, the Commission finds that to protect against the unauthorized disclosure of classified information during proceedings open to the public, it will be necessary to employ a forty-second delay in the broadcast of the proceedings from the courtroom to the public gallery. Should classified information be disclosed during any open proceeding, this delay will allow the Military Judge, CSO, or Government to take action to suspend the broadcast—including any broadcast of the proceedings to locations other than the public gallery of the courtroom (e.g., any closed-circuit broadcast of the proceedings to a remote location)—so that the classified information will not be disclosed to members of the public.

43. The broadcast may be suspended whenever it is reasonably believed that any person in the courtroom has made or is about to make a statement or offer testimony disclosing classified information.

44. The Commission shall be notified immediately if the broadcast is suspended. In that event, and otherwise if necessary, the Commission may stop the proceedings to evaluate whether the information disclosed, or about to be disclosed, is classified information as defined in this

Protective Order. The Commission may also conduct an *in camera* hearing to address any such disclosure of classified information.

D. Other Protections

45. During the examination of any witness, the Government may object to any question or line of inquiry that may require the witness to disclose classified information not found previously to be admissible by the Commission. Following such an objection, the Commission will determine whether the witness's response is admissible and, if so, may take steps as necessary to protect against the public disclosure of any classified information contained therein.

46. Classified information offered or admitted into evidence will remain classified at the level designated by the OCA and will be handled accordingly. All classified evidence offered or accepted during trial will be kept under seal, even if such evidence was inadvertently disclosed during a proceeding. Exhibits containing classified information may also be sealed after trial as necessary to prevent disclosure of such classified information.

E. Transcripts

47. Transcripts of all proceedings shall be redacted as necessary to prevent public disclosure of classified information. The Clerk of the Military Commission, in conjunction with the CSO, shall ensure the transcripts of all proceedings are reviewed and redacted as necessary to protect any classified information from public disclosure. An unclassified transcript of each proceeding shall be made available for public release.

48. The Clerk of the Military Commission, in conjunction with the CSO, shall ensure that transcripts containing classified information remain under seal and are properly segregated from the unclassified portion of the transcripts, properly marked with the appropriate security markings, stored in a secure area, and handled in accordance with this Protective Order.

VIII. UNAUTHORIZED DISCLOSURE

49. Any unauthorized disclosure of classified information may constitute a violation of United States criminal laws. Additionally, any violation of the terms of this Protective Order shall immediately be brought to the attention of the Commission and may result in disciplinary action or other sanctions, including a charge of contempt of the Commission and possible referral for criminal prosecution. Any breach of this Protective Order may also result in the termination of access to classified information. Persons subject to this Protective Order are advised that unauthorized disclosure, retention, or negligent handling of classified documents or information could cause damage to the national security of the United States or may be used to the advantage of an adversary of the United States or against the interests of the United States. The purpose of this Protective Order is to ensure that those authorized to receive classified information in connection with this case will never divulge that information to anyone not authorized to receive it, without prior written authorization from the OCA and in conformity with this Order.

50. The Defense shall promptly notify the CSO upon becoming aware of any unauthorized access to or loss, theft, or other disclosure of classified information, and shall take all reasonably necessary steps to retrieve such classified information and protect it from further unauthorized disclosure or dissemination. The CSO shall notify the Government of any unauthorized disclosures of classified information so that the Government may take additional remedial measures as necessary to prevent further unauthorized access or dissemination.

IX. DISPOSITION OF CLASSIFIED INFORMATION

51. All classified documents and information to which the Defense has access in this case are the property of the United States. Upon demand of the CSO or the Government, the Defense

shall return any documents containing classified information in its possession which were obtained in discovery from the Government, or for which the Defense is responsible because of its access to classified information in connection with this case.

52. Unless otherwise ordered or agreed, within sixty days after the final termination of this action, including any appeals, the Defense shall, at its option, return or properly destroy all classified information in its possession in connection with this case, including all notes, abstracts, compilations, summaries, or any other form or reproduction of classified information. The Defense is responsible for reminding any expert witnesses, non-testifying consultants, and all other persons working with the Defense of its obligation to return or destroy classified information related to this case. The Defense shall submit written certification to the CSO and the Government by the sixty-day deadline confirming that all classified information has been returned or destroyed as set forth in this Protective Order.

X. SURVIVAL OF ORDER

53. The terms of this Protective Order and any signed MOU shall survive and remain in effect after the termination of this case.

54. This Protective Order is entered without prejudice to the right of the parties to seek such additional protections, or exceptions to those stated herein, as they deem necessary.

SO ORDERED:

DATED: _____

JAMES L. POHL
COL, JA, USA
Military Judge